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No.

In The
Supreme Court of the United States
October Term, 1994

GEORGE NORRIS HALL, *Petitioner,*

v.

HENRY GRAYSON, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AND APPENDICES

EDWARD J. JOCQUE
Counsel of Record
2216 East Michigan Avenue
Lansing, Michigan 48912-3028
(517) 886-0554

October 17, 1994 *Counsel for Petitioner*

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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QUESTIONS PRESENTED

I.

ARE THE STANDARDS FOR DISMISSAL FOR ABUSE OF THE WRIT OF *HABEAS CORPUS* ADEQUATELY ADDRESSED IN CASES WHERE EVIDENCE WHICH WAS UNAVAILABLE TO THE PETITIONER LATER COMES TO LIGHT?

II.

ARE THE STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, AS FOLLOWED BY THE LOWER COURTS, IN CONFLICT WITH THE SUPREME COURT DECISIONS?

III.

WAS THE PETITIONER DEPRIVED OF A FAIR TRIAL BECAUSE, WHEN HE RELUCTANTLY ACQUIESCED TO HIS ATTORNEY'S TAINTED RECOMMENDATION NOT TO TESTIFY, THE PRESENTATION OF EXCULPATORY EVIDENCE WAS FORECLOSED?

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AND APPENDICES

George Norris Hall respectfully petitions for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. B-E, *infra*, B-1–E-1) are unreported. The opinions of the district court (App. A, *infra*, A-1–A-12) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 27, 1994 (App. E, *infra*, E-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The original petition in the lower courts was based on an application for a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254.

STATEMENT

The Petitioner, George Norris Hall, brought a *Habeas Corpus* action in the United States District Court for the Eastern District of Michigan. On February 25, 1993, the district court dismissed the action based on abuse of writ and did not issue a certificate of probable cause (App. A, *infra*, A-1–A-12). The case was appealed to the United States Circuit Court for the Sixth Circuit where a certificate of probable cause was again denied (App. B, *infra*, B-1–B-2). On application for reconsideration, the court of appeals reversed its decision and ordered the case to be heard (App. C, *infra*, C-1). The case was argued before the court of appeals. The court of appeals denied relief on June 14, 1994 (App. D, *infra*, D-1–D-4). On July 27, 1994, the court of appeals denied reconsideration (App. E, *infra*, E-1).

The denials of the Petitioner's Writ of *Habeas Corpus* all raise three issues: whether there is an abuse of the writ, whether there was ineffective assistance of counsel, and whether testimony not presented at trial might have prejudicially affected the outcome of the trial. Briefly, Mr. Hall's contention is that his trial counsel, H. Eugene Bennett, cooperated with Charles Palmer, trial counsel for Mr. Hall's co-defendant, Leo McGill, in order to convince Mr. Hall not to testify in his own defense at his trial because Mr. Hall's testimony would have the effect of securing the conviction of Mr. McGill, who presented as his defense that he was not present at the crime, did not testify, called no witnesses and was in fact acquitted. This allegation is supported by a letter from Mr. Palmer to Mr. Bennett written in 1979 (App. F, *infra*, F-1–F-2) and by Mr. Bennett's testimony at an Evidentiary Hearing held in 1990. Mr. Hall further contends that he did not know of this collusion between Mr. Bennett and Mr. Palmer until he found Mr.

Palmer's letter some time in 1988, two years after his first *Habeas* action (which he began *pro se*) had been denied. Moreover, Mr. Hall contends that, had he testified at his trial, his chances of acquittal or of conviction of a lesser charge would have been materially increased because he would have been able to present defenses — namely, claim of right and lack of intent — which could not be introduced except through his own testimony. Finally, additional evidence has subsequently come to light which tends to support his innocence of the charges of which he was convicted.

REASONS FOR GRANTING THE PETITION

The lower courts have erroneously ruled that a person who has been convicted of a crime must raise all issues in his or her first appeal, regardless of whether those issues could be supported by the evidence available to the appellant at the time of the first appeal. The lower courts have also mistakenly gone not only against the holdings in this Court on the issue of ineffective assistance of counsel in conflict of interest cases but also against the holdings in their own circuit.

I.

THE STANDARDS FOR DISMISSAL FOR ABUSE OF THE WRIT OF *HABEAS CORPUS* DO NOT ADEQUATELY ADDRESS CASES WHERE EVIDENCE WHICH WAS UNAVAILABLE TO THE PETITIONER LATER COMES TO LIGHT.

Mr. Hall's petition was dismissed on grounds of an abuse of writ. The argument was accepted that he could have raised an ineffective assistance of counsel claim when he brought his first *Habeas Corpus* action. In its opinion, at p. 5 (App. D, *infra*, D-4), the court of appeals held, "Clearly, the question of trial counsel's

ineffectiveness could have been litigated in the earlier § 2254 action." This is incorrect. It might be true of an ordinary claim of ineffectiveness, based on the observable course of the trial; but Mr. Hall's claim concerns an extremely unusual form of ineffective assistance of counsel and is based on information which was not available to him at any time during the course of his earlier actions. Mr. Palmer's letter to Mr. Bennett was not even written until 1979, nine months after Mr. Hall's state appeal ended; and Mr. Hall did not discover it until 1988, more than two years after the Sixth Circuit Court of Appeals denied his first *Habeas* action. There was no contact between Mr. Hall and Mr. Bennett from 1975 until approximately March 1988. Indeed, despite repeated efforts, Mr. Hall was unable to reach Mr. Bennett in connection with his first appeal, which was submitted to the Michigan Court of Appeals in 1977 and rejected by the court in 1978. Mr. Bennett's license to practice law was revoked, effective May 29, 1980, after he was convicted on felony charges, and was not reinstated until January 27, 1987. Mr. Bennett's contacts with Mr. Hall, after Mr. Hall's conviction, have all been since Mr. Bennett's reinstatement to the bar.

Moreover, it is unreasonable to expect a defendant to question his attorney about whether that attorney was ineffective because he had committed so shocking a breach of ethics as to put a co-defendant's interests above his own client's interests. In fact, Mr. Hall repeatedly asked Mr. Bennett at trial why he could not testify, and never once did Mr. Bennett give any reason for the decision not to testify except impeachment. Mr. Hall then "reluctantly" followed his attorney's advice. Mr. Bennett presented Mr. Hall a plausible reason for not putting him on the stand, but it was not the real reason. Indeed, the real reason is so unlikely that even an experienced appellate attorney would hardly have

thought to raise it as a possibility. As it has been long held in the law that claims may not be brought without evidence to support them, this ineffective assistance claim, had it been brought in Mr. Hall's state appeal in 1977-78 or in his first *Habeas* action in 1983-86, would have been dismissed as frivolous. According to *Cuyler* v *Sullivan*, 446 U.S. 335; 100 S.Ct. 1708, 1719; 64 L.Ed.2d 333 (1980), a defendant must "show that his counsel actively represented conflicting interests" in order to "establish the constitutional predicate for his claim of ineffective assistance." Because of this threshold, Mr. Hall could not present an ineffective assistance of counsel claim until he had Mr. Palmer's letter to substantiate the allegation. In *Murray* v *Carrier*, 477 U.S. 478; 106 S.Ct. 2639; 91 L.Ed.2d 397 (1986), at 2645, the Court held "that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause [for a procedural default] under this standard," that is, the standard for ineffective assistance claims established by *Strickland* v *Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). At the time of his first *Habeas* petition, Mr. Hall lacked the factual basis for a claim.

The district court was also in error when it accepted the Respondent's allegation that Mr. Hall and Mr. Bennett were continuously in contact from the time of the trial onwards (App. A, *infra*, A-7). At the Evidentiary Hearing in 1990, Mr. Bennett stated that he had seen Mr. Hall about four times in the preceding two years. When Mr. Hall attempted to challenge the prosecutor's assertion that Mr. Bennett had maintained contact with him since the conviction, the court refused to accept his refutation. Therefore, even though Mr. Palmer's letter says that he hopes the letter will help with Mr. Hall's appeal, the letter was written too late to help; Mr. Bennett was not involved in Mr. Hall's appeal; and Mr. Bennett did not

transmit the letter to Mr. Hall for many years, nor did he call Mr. Hall's attention to the letter when it was transmitted along with a large quantity of other material.

In *Dean* v *United States*, 788 F. Supp 306, 311 (E.D. Tex. 1992), the court, relying on *Price* v *Johnston*, 334 U.S. 266, 292; 68 S.Ct. 1049, 1063; 92 L.Ed. 1356 (1948), held that a prisoner who proceeds through the first *Habeas Corpus* action *pro se* should not be held to the same standards as a prisoner who was represented by counsel. The *Dean* court specifically pointed out on page 310 that in *McCleskey* v *Zant*, 499 U.S. 467; 111 S.Ct. 1454; 113 L.Ed.2d 517 (1991), the applicant was represented by counsel in both *Habeas* actions and the Court stated that in order to bring a second action there must be a "showing of some external impediment preventing ***counsel*** from constructing or raising a claim." *McCleskey*, 111 S.Ct. at 1472 (emphasis added). Here, as in *Dean*, Mr. Hall began his first *Habeas pro se*. Mr. Hall was not appointed counsel until after his case reached the court of appeals, and by that time all the issues in that *Habeas* had been raised and counsel was to address the issues brought at the time, not raise new ones before the appellate court.

In *McCleskey, supra*, at 1470, the Court held that in order to satisfy the burden of defending against a claim of abuse of writ a petitioner "must show cause for failing to raise it [the claim of ineffective assistance] and prejudice therefrom . . . ." Mr. Hall has met both of these tests. He has shown, by more than a mere preponderance of the evidence, why he could not raise his claim of ineffective assistance of counsel at the time of his first appeal. He has also shown that his defense was substantially weakened by his counsel's behavior.

Arguments and rulings against this *Habeas* petition presume that Mr. Hall had Mr. Palmer's letter available

to him when or soon after it was written in 1979 but chose to reserve it for future use if his first *Habeas* petition failed. This is doubly fallacious. First, Mr. Hall was not in contact with Mr. Bennett and did not have access to the letter until 1988. Second, the premise — that a petitioner would forgo using his best argument in his first petition — defies common sense on the part of an inmate who is not on death row. All such an inmate would do by this tactic would be to prolong his time of incarceration. *Dean, supra*, at 311, cites the Advisory Committee Note to Rule 9(b): "Most prisoners . . . are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application." Surely, had Mr. Hall known of Mr. Palmer's letter and therefore of Mr. Bennett's behavior at trial at the times when he filed his state appeal and his first *Habeas* petition, the allegations which he is now making would have been one of the focal points of each action.

In addition, the *McCleskey* Court held, at 1470, "If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." There can be few more fundamental miscarriages of justice than for a defendant to be convicted at least in part because his attorney misled him in order to benefit a co-defendant. Such divided loyalties on the part of an attorney cannot meet even the minimum Sixth Amendment constitutional standards for representation. As this Court held in *Kimmelman* v *Morrison*, 477 U.S. 365, 377; 106 S.Ct. 2574, 2584; 91 L.Ed.2d 305 (1986),

> The right of an accused to counsel is beyond question a fundamental right . . . . Without counsel the right to a fair trial itself would be of

> little consequence . . . , for it is through counsel that the accused secures his other rights . . . . ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have"). The constitutional guarantee of counsel, however "cannot be satisfied by mere formal appointment." . . . "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." . . . In other words, the right to counsel is the right to ***effective*** assistance of counsel. (Citations omitted; emphasis added).

In light of the evidence presented by Mr. Palmer's letter and by his own testimony at the Evidentiary Hearing, Mr. Bennett's assistance to Mr. Hall can hardly be considered effective.

Lastly, in *Lewandowski* v *Mackel*, 949 F.2d 884 (1991), at 890, the court noted that when there is a finding of ineffective assistance of counsel the court did not abuse its discretion in granting *Habeas* relief to the petitioner.

II.

THE STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, AS FOLLOWED BY THE LOWER COURTS, ARE IN CONFLICT WITH UNITED STATES SUPREME COURT DECISIONS.

In *Kirby* v *Dutton*, 831 F.2d 1280 (6th Cir. 1987), at 1282, the court, citing *Cuyler* v *Sullivan, supra*, held:

> **"In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest [in his lawyer's representing multiple clients] adversely affected**

> his lawyer's performance." (Citation omitted.) If a petitioner can show that a plausible defense was foreclosed, then he has established an actual conflict. (Citation omitted.) Additionally, if the joint defendants' interest diverged with respect to a "material factual or legal issue or to a course of action," then a conflict has been established as well. (Citation omitted).

Mr. Bennett's actions were even more egregious than those envisioned by the *Kirby* court, in that he was not even representing Mr. McGill when he was Mr. Hall's attorney; but otherwise his actions fit the quoted definitions exactly. Mr. Hall's claim-of-right defense and his lack-of-intent defense, both plausible and potentially absolute, were foreclosed when, on Mr. Bennett's advice, he did not take the stand. The joint defendants' interests obviously diverged as to a course of action, for the testimony which Mr. Hall would have given in his own defense was the prosecution's strongest evidence against Mr. McGill.

The principal argument in the court of appeals' opinion, at p. 4 (App. D, *infra*, D-3), is that Mr. Palmer's letter does not support Mr. Hall's contention because the pronoun "we" in one sentence of the letter refers to Mr. Palmer and Mr. McGill, rather than to Mr. Palmer and Mr. Bennett. Even if, *arguendo*, this conclusion is accepted, it ignores a good deal of other evidence — including the bulk of the passage quoted by the court from the letter — that Mr. Palmer, acting in Mr. McGill's interest, put pressure on Mr. Bennett to keep Mr. Hall off the stand and that Mr. Bennett acceded to that pressure. The letter was only the catalyst which led to the holding of the Evidentiary Hearing, and the Evidentiary Hearing produced unambiguous evidence that Mr. Bennett breached the loyalty which he owed his client

by allowing himself to become involved in a conflict of interest and failing to make the trial court aware of the problem.

Most tellingly, Mr. Bennett was asked at that hearing, "If Mr. McGill had not been tried with Mr. Hall, even though the impeachment ruling had gone against you, do you think you would have put Mr. Hall on the stand to testify?" He eventually replied, "I would have to say I probably would have, yes." He was then asked, "You would have?" To which he replied, "Yes." In the course of the same colloquy, the following dialogue occurred:

> Q. . . . Mr. Palmer urged you not to put Mr. Hall on the stand?
>
> A. That is correct.
>
> Q. Did he do this on more than one occasion?
>
> A. As I recall, yes. That was a fairly running conversation.
>
> Q. Ongoing?
>
> A. Ongoing.
>
> Q. Ongoing throughout the trial?
>
> A. Yes.

The cross-examination of Mr. Bennett by the prosecutor contains the following exchange:

> Q. Now, sir, you have said in response to Mr. Hall's, your former client's, questions that there was some pressure or you felt some pressure from Mr. Palmer not to put Mr. Hall on the stand; is that correct?
>
> A. Yes, I do believe that Mr. Palmer did urge me not to put George on the stand because of

the implication and the ramifications that would inure to Leo McGill.

Q. Now, is it your testimony at this time that you were influenced by that pressure not to put your client on the stand?

A. I would have to say it was a factor. We were — we were taking the position united we stand, divided we fall.

Later on, this exchange occurred:

Q. You've also indicated, though, with reference to this pressure from the other side that that had some influence. Now, did you ever bring that to the attention of the Court?

A. No.

Q. Did you ever talk that over with the Judge?

A. No, I did not.

Q. So your motions to sever were based on other grounds, weren't they?

* * *

Q. My question is whether or not your motions to sever were based on grounds other than on getting pressure from the other side to put — to keep your client off the stand.

A. Yes. I would have to say the pressure on me with respect to the motion to sever, that wasn't even a consideration at that time. That was pretrial.

Mr. Bennett's baffling decision to proceed on the strategy of "united we stand, divided we fall," runs clearly contrary to the duties of a defense attor-

ney.[1] Both *Cuyler, supra*, and *Kirby, supra*, in discussing the situation in which a lawyer is representing two clients and therefore has responsibilities to both, insist that the lawyer breaches his or her ethical duty if he or she prefers the interests of one to another. The strongest statement occurs in *United States* v *Georvassilis*, 498 F.2d 883 (6th Cir. 1974), a Michigan case, in which the court stated:

> Although it was not raised in the briefs, there is one more matter that is of sufficient importance to warrant discussion. Defense counsel discovered prior to the original trial that Murphy had a strong defense that was inconsistent with that of the appellant. Moreover, if Murphy had taken the stand, his testimony would have been detrimental to the appellant's cause. When such a situation arises, it is impossible for one attorney to represent the interests of both defendants in a joint trial. *See Glasser* v *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Defense counsel should have realized that a vigorous defense of Murphy would have been detrimental to appellant. To avoid all possible conflicts of interest an attorney may have to limit his representation in such situations to only one of the defendants. *See* The Code of Professional Responsibility of

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[1] **As the *Michigan Rules of Professional Conduct*, Rule 1.7(b), Conflict of Interest, say, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." The Comment expands this by saying, "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."**

> the American Bar Association, EC 5-14 through 5-17. . . . For in attempting to persuade one defendant to take the stand, the attorney must necessarily work against the interest of his other client. On the other hand, if he does not vigorously urge one defendant to testify, he has not met his responsibility to that client. The situation is fraught with difficulty for both the attorney and the client. The only effective and proper solution would appear to be the attorney's withdrawal from representation of one of the defendants. *Id. at* 886.

Georvassilis is clear that an attorney cannot represent the interests of two defendants at the same trial if, in order to assert a defense, one defendant must damage the case of the co-defendant. The case at bar is even more egregious, for here Mr. Bennett did not merely "not vigorously urge" Mr. Hall to testify; instead, he actively persuaded Mr. Hall not to testify and thereby foreclosed an "absolute defense" — all this not for the benefit of another client but for a co-defendant, Mr. McGill, who was not his client and whose attorney was concerned not for Mr. Hall's defense but for his own client's acquittal. If it is wrong for an attorney to place two clients' interests at odds during a trial, *a fortiori* it is wrong to place a non-client's interests ahead of a client's interests. When, in other words, an attorney agrees, without consultation with the client, to alter the client's defense in order to achieve an acquittal for a co-defendant, that attorney has breached the attorney-client relationship to the extent that the defendant's Fifth Amendment due process rights and Sixth Amendment rights to a fair trial are completely destroyed.

Mr. Bennett's conduct at the trial violated professional ethics in another fashion as well. In *Cuyler, supra,*

at 1717, the Court, basing its holding on the ABA Code of Professional Responsibility, said, "Defense counsel have an ethical obligation to avoid conflicting representations **and to advise the court promptly when a conflict of interest arises during the course of trial**" (emphasis added). According to his own testimony at the Evidentiary Hearing, Mr. Bennett did nothing of the kind.

III.

THE PETITIONER WAS DEPRIVED OF A FAIR TRIAL BECAUSE, WHEN HE RELUCTANTLY ACQUIESCED TO HIS ATTORNEY'S TAINTED RECOMMENDATION NOT TO TESTIFY, THE PRESENTATION OF EXCULPATORY EVIDENCE WAS FORECLOSED.

Because Mr. Bennett persuaded Mr. Hall not to testify, Mr. Hall's version of what happened that night was never made part of the record. Briefly, his testimony would have been that his memory of the whole evening is erratic because of his ingestion of alcohol and drugs and the fact that he was beaten; he does not remember the episode of the shootings, but he does remember being in the company of Mr. McGill at various times prior to the shootings. He would also have testified that he believed he was being cheated by the victims and that, when he protested, he was ejected from the card game and beaten by them. He would have testified further that his intent was not to rob or kill but to get back the money of which he believed they had cheated him. He would have been permitted to present additional evidence to support this claim of right: he would have called various persons who would have testified that the victims had been known to cheat and had been known to carry weapons. However, this defense would have put his co-defendant at the scene, thereby greatly

increasing the likelihood that Mr. McGill would have been convicted.

At the 1990 hearing, Mr. Bennett acknowledged that this claim-of-right defense would have constituted "an absolute defense" against the charges of felony murder of which Mr. Hall was convicted. In its opinion, at p. 3 (App. D, *infra*, D-2), the court of appeals says, "Claim of right would not, of course, be a valid defense to two other counts of premeditated murder, for which Hall was also convicted and sentenced . . . ." Given the various facets of the testimony which Mr. Hall would have given had he taken the stand, however, it is not possible to predict what the outcome of the jury's deliberations might have been. The jury might have found that Mr. Hall had a valid claim of right, which would have defeated the charges of felony murder. They might have found that Mr. Hall did not premeditate the deaths which occurred, which would also have defeated the charges of first degree murder. They might also have found that, because of his alcohol and drug consumption and his injuries, he did not and could not have formed the intent required for first degree murder or for felony murder.[2] Such speculations are beside the point, however, for, as *Cuyler, supra*, at 1719, holds:

> *Glasser [supra]*, established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." Thus a

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2 In fact, one of the convictions which was set aside by the Michigan Court of Appeals was for second degree murder rather than first degree.

> defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. (Citations omitted.)

Moreover, although the district court cited *People* v *Hall*, 83 Mich App 632, 635-36 (1978); *lv. denied*, 405 Mich 826 (1979), which stated, "Little dispute exists about the events leading up to defendant's conviction" (App. A, *infra*, A-2), that statement is inaccurate. Mr. Hall has filed, in previous actions in this case, affidavits of several persons whose statements controvert the testimony at trial of the lone survivor of the incident. Mr. Hall's co-defendant, Mr. McGill, after his acquittal, signed an affidavit saying that Mr. Hall did not shoot anybody and that, in fact, the people who died were actually shot by himself and Aubon M. Hutchens (App. G, *infra*, G-1–G-6). Mr. Hall, who has asserted that he was so affected by ingestion of drugs and alcohol and by the beating which he had sustained earlier in the evening that he does not remember the incident, did not even know of Mr. Hutchens' presence at the scene until Mr. McGill told him of it several years after the fact. Mr. Hutchens' presence and participation were independently confirmed by John T. Crown, a co-participant with Mr. Hutchens in an entirely separate offense, who presented an affidavit stating that Mr. Hutchens had told him that he had shot the persons whom Mr. Hall has been convicted of killing (App. H, *infra*, H-1–H-2). Mr. Hutchens, who was later shot to death by the Detroit Police, had also told Mr. Crown that he was given the murder weapons by Mr. McGill and that he had disposed of them. Both these affidavits were filed with the Eastern District Federal Court in earlier proceedings. In addition, early reports of the incident given by the wife of one of the victims indicated that she had heard the voices of three persons other

than the victims, which would confirm the presence of both Mr. McGill and Mr. Hutchens in addition to Mr. Hall. The lone survivor, N. A. Gaulden, also told a different story at the preliminary examination from the one he told at trial. At the preliminary examination, he could not identify the person who did the shootings, yet at the trial he stated that it was George Hall.

In *McCleskey, supra*, at 1470, the Court held that in order to satisfy the burden of defending against a claim of abuse of writ a petitioner "must show cause for failing to raise it [the claim of ineffective assistance] and prejudice therefrom . . . ." Mr. Hall has met both of these tests. He has shown, by more than a mere preponderance of the evidence, why he could not raise his claim of ineffective assistance of counsel at the time of his first appeal. He has also shown that his defense was substantially weakened by his counsel's behavior. The facts of this action are simple. First, Mr. Bennett represented Mr. Hall. Second, Mr. Palmer represented Mr. McGill. Third, Mr. Bennett's original trial strategy was to assert a claim-of-right defense and a temporary insanity defense. Fourth, Mr. Palmer's defense was that of claiming mistaken identity and forcing the prosecution to prove its case against Mr. McGill. Fifth, Mr. Palmer pressured Mr. Bennett to keep his client from testifying in order to protect Mr. McGill. Sixth, when, however, Mr. Bennett advised Mr. Hall not to testify, the grounds he gave were not that Mr. Hall's testimony would implicate Mr. McGill, but that Mr. Hall would be impeached by prior convictions. Seventh, Mr. Hall reluctantly agreed to his attorney's recommendation. And, eighth, because Mr. Hall did not testify, the claim-of-right defense could not be asserted, nor could additional witnesses be called because a proper foundation could not be laid. These facts were not contradicted by the prosecution at the Evidentiary Hearing. Under no circumstances

should lying to a client to protect a non-client be considered a valid trial tactic or strategy. When he misstated his reason for advising Mr. Hall not to testify, Mr. Bennett deprived the Petitioner of the right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

By: /s/ EDWARD J. JOCQUE
Counsel of Record for Petitioner
2216 East Michigan Avenue
Lansing, Michigan 48912-3028
(517) 886-0554

Dated: October 17, 1994

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed February 25, 1993)

(GEORGE NORRIS HALL, Petitioner, vs. HENRY GRAYSON, Respondent — CASE NO. 92-CV-70917-DT; HON. LAWRENCE P. ZATKOFF)

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the day of February 25, 1993.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Petitioner, George Norris Hall ("Petitioner"), presently confined at the Egeler Correctional Facility in Jackson, Michigan, has filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, Petitioner attacks his October 24, 1975, jury convictions for two counts of first degree murder and one count of felony murder. Petitioner also attacks his conviction for one count of assault with intent to commit murder and one count of assault with intent to rob, while armed, perpetrated against a victim who survived. Petitioner is serving life sentences for each of these convictions. Petitioner was jointly tried with co-defendant Leo McGill ("McGill"), who was acquitted on every count.

The facts underlying Petitioner's convictions are as follows:

> Little dispute exists about the events leading up to defendant's conviction. Early in the morning of January 30, 1975, defendant was a participant in a card game at the home of John Fowler in East Lansing, Michigan. At about 3 a.m. defendant and Lawrence Chappell became involved in an altercation. Testimony at trial indicated that defendant produced a knife and threatened Chappell with violence. Eventually the parties returned to their card game and defendant left the building at 5 a.m. At that time only Lawrence Chappell, Charles Bouvinette [*sic*], N. A. Gaulden, and John Fowler remained at Fowler's residence. Half an hour later, defendant went to the home of Karen Lawson and demanded the return of firearms he had left with her.
>
> Testimony regarding the actual murders was produced by N. A. Gaulden, the lone survivor of the incident. At about 6 a.m., defendant and another man identified as Leo McGill returned to the home where the card game was being played. Defendant was refused his request to rejoin the game because he had no money. Defendant responded, "Never mind, it doesn't matter. We are taking all the money anyhow." At this point, defendant and codefendant McGill drew guns and ordered everybody to the floor. Gaulden then heard shots and saw Charles Bovinette fall, although he could not determine who had fired the shots. Next, he saw defendant shoot at Lawrence Chappell.
>
> Defendant then told Gaulden to give him his money. After complying, he was ordered to lie on

> the floor. He then heard several shots and was struck twice by bullets, once in the side and once in the back. Shortly afterward, Gaulden called the police. On arrival, they found John Fowler and Lawrence Chappell dead. Charles Bovinette died on February 4, 1975.

People v. *Hall*, 83 Mich App. 632, 635-36 (1978), *lv. denied*, 405 Mich. 826 (1979).

I.

ISSUE PRESENTED AND PROCEDURAL HISTORY

Petitioner raises a single issue in the petition before the Court. Petitioner contends that his defense at trial was sabotaged by a conflict of interest undertaken by his trial counsel, and thus Petitioner had ineffective assistance of counsel. Petitioner did not testify at his trial. Petitioner maintains that he wanted to testify, but that he reluctantly agreed to his trial counsel's recommendation that he not do so. At the time of trial, defense counsel told Petitioner he should not testify because of his several prior convictions for armed robbery. Defense counsel had filed an unsuccessful motion *in limine* to have evidence of the convictions excluded. Defense counsel persuaded Petitioner that his impeachment with the prior armed robbery convictions — in a trial where multiple murders arose out of an armed robbery — would hurt Petitioner more than his testimony would help him.

Petitioner claims that trial counsel's decision not to have Petitioner testify was motivated by a desire to protect Petitioner's co-defendant, McGill. McGill's defense at their joint trial was that he was not present when the shootings happened, and that testimony placing him at the scene resulted from a mistaken identification. Petitioner contends that his trial counsel's desire to assist

McGill, who was represented by a different attorney, constituted a conflict of interest which deprived him of effective assistance of counsel.

Respondent notes that Petitioner filed a previous habeas petition which did not raise the ineffective assistance of counsel claim. Respondent has noted Petitioner's prior writ history and submitted copies of Judge Joiner's memorandum opinion denying habeas relief, *Hall* v. *Grant*, CV-82-60407 (E.D. Mich. January 30, 1984), and the Sixth Circuit's opinion affirming this denial. *Hall* v. *Grant*, No. 84-1531 (6th Cir. January 15, 1986). Respondent contends that Petitioner abused the writ by failing to raise his ineffective assistance of counsel claim in his first petition and that the present petition should be dismissed as an abuse of the writ. Respondent's Answer at 16-21.[1]

At their joint trial, Mr. Bennett represented Petitioner and Mr. Palmer represented McGill. Petitioner contends that critical new evidence of Bennett's divided loyalty only became available to him in late 1988 or 1989. Petition at 6-7. The alleged new evidence is a letter dated October 18, 1979, from Palmer to Bennett. The letter was written after the trial. In it, Palmer mentions having asked Bennett "on a number of occasions to keep George Hall off the [witness] stand." Petitioner's Attachment A, letter of Charles A. Palmer to H. Eugene Bennett dated October 18, 1979.

In the letter Palmer explained his desire that Petitioner not testify as follows: "I thought that Leo would

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[1] Respondent concedes that Petitioner has exhausted his state court remedies concerning the ineffective assistance of counsel issue. Respondent's Answer at 6-7. However, the Supreme Court has ruled that abuse of the writ is a threshold issue which should be considered before consideration of the exhaustion of state court remedies. *McCleskey* v. *Zant*, 111 S.Ct. 1454, 1466 (1991); *Wise* v. *Fulcomer*, 958 F.2d 30, 34-35 (3d Cir. 1992).

surely lose if George [Petitioner] testified. If George said it wasn't Leo with him, then [Prosecutor] Wilson would have asked who it was. Since George wouldn't tell, it would have hurt Leo's case. If George testified that he didn't remember who it was, that would also look like he was protecting Leo. Obviously, if George had testified that Leo was with him, then Leo would have been convicted. In any case, Leo would have lost if George testified." Petitioner's Attachment A.

Petitioner maintains that this letter constitutes new evidence of a conflict of interest which deprived him of effective assistance of counsel. Moreover, Petitioner contends that the availability of this letter, *after* his first petition was filed, excuses his failure to raise the ineffective assistance of counsel/conflict of interest claim in his first petition.

An evidentiary hearing was held on January 19, 1990, in the trial court inquiring into Petitioner's claim that his attorney's recommendation that he not testify on his own behalf was not a strategic decision based on Petitioner's interests, but rather was based on an improper desire to aid McGill.

At the hearing, Petitioner's trial counsel, Mr. Bennett, testified that attorney Palmer had urged Bennett not to have Petitioner testify. Evidentiary Hearing ("EH") at 20-21. Bennett testified that Petitioner's defenses at trial were temporary insanity and diminished capacity, based on Petitioner's condition as a result of "a two or three day bender with alcohol and I believe some sort of amphetamines, and lack of sleep," and having been physically beaten prior to the killings. EH at 6-9.

Bennett also stated that he initially intended to raise a claim of right defense to felony murder charge, but was unable to do so without having Petitioner testify.

EH at 18-19. The claim of right defense was a claim that Petitioner had a right to reclaim money which he had been cheated out of in the card game. Bennett testified this defense could have been an absolute defense to the felony murder charge by establishing that Petitioner was not guilty of robbery, and therefore was not guilty of killing in the course of committing another felony.[2]

When asked if it would have been in Petitioner's best interests for him to have testified, Bennett replied that, "Well, there is a lot of factors to consider. Obviously, you[3] were convicted, so I'd guess I'd have to say now I certainly do." EH at 23. When asked to evaluate whether at the time of the trial it would have been in Petitioner's best interests to testify, Bennett replied, "Yes." EH at 23.

On cross examination, Bennett admitted that the admissibility of Petitioner's prior armed robbery convictions were "a factor" in determining his position that Petitioner should not testify. EH at 28. Bennett added that Petitioner was "taking medication and he was a little bit zombie-like" during the trial. EH at 28. Bennett stated that he was influenced by pressure from Palmer not to have Petitioner testify and characterized their joint trial position as "united we stand, divided we fall." EH at 28.

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2 This Court notes that the Michigan Court of Appeals found that Petitioner's sentencing on three counts of felony murder, two counts of first degree premeditated murder, and one count of second degree murder for the same three killings violated the Double Jeopardy Clause. That court vacated two of the felony murder sentences and the second degree murder sentence. Petitioner remains in custody under two sentences for first degree premeditated murder, one sentence for felony murder, as well as separate sentences for assault with intent to commit murder and assault with intent to rob while armed. *People* v. *Hall*, 83 Mich. App. at 636-38.

3 Petitioner questioned Bennett at the hearing.

Respondent notes that the contents of the 1979 letter indicates that the letter was sent to Bennett to assist Petitioner in his appeal. Respondent further states that "[t]rial counsel acknowledged an ongoing relationship with the Petitioner subsequent to trial and it seems likely that this information was forward [sic] to Petitioner to assist him with his *pro se* efforts." Respondent's Answer at 20. Moreover, Respondent maintains that "Petitioner has not demonstrated to this court any objective factor external to the defense which prevented him from raising the within claim of ineffective assistance of counsel in his prior petition." Respondent's Answer at 20.

II.
OPINION

A. STANDARD OF REVIEW

The Supreme Court has held, with reference to a second or subsequent application asserting new grounds or grounds not previously decided on the merits, that such an application constitutes an abuse of the writ through inexcusable neglect unless the petitioner can show cause for failing to raise these grounds in his first petition and prejudice therefrom. *McCleskey* v. *Zant*, 111 S.Ct. 1454 (1991). The Supreme Court has instructed the lower federal courts are to conduct the following inquiry regarding potential abuse of the writ:

> The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse of the writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and

> particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes the petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.

Id. at 1470.

Regarding the showing of cause for failure to raise the claim in an earlier petition, the Supreme Court noted that:

> In procedural default cases the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986): Objective factors that constitute cause include "'interference by officials'" that make compliance with the state's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* . . . Once the petitioner has established cause, he must show "'actual prejudice' resulting

from the errors of which he complains," *United States* v. *Frady*, 456 U.S. 152, 168 (1982).

Id.

B. LEGAL ANALYSIS

In the present case, Petitioner has raised an ineffective assistance of counsel claim not presented in his 1982 petition. Respondent has noted Petitioner's prior writ history, identified the claim presented for the first time in this second habeas petition, and alleged that its presentation in this subsequent petition constitutes an abuse of the writ. Respondent's Answer at pages 5-7. Thus, the burden for disproving abuse of the writ rests with Petitioner.

Petitioner argues that he was not aware of the 1979 letter indicating that his co-defendant's counsel had urged Petitioner's counsel not to have Petitioner testify at their trial until years after his first habeas petition was filed. Petitioner implicitly argues that the factual basis for his ineffective assistance of counsel claim was not reasonably available to him until he became aware of the letter and the fact that attorney Bennett considered McGill's interests when advising Petitioner not to testify.

Respondent maintains that Petitioner and/or Petitioner's appellate counsel probably knew about the letter and McGill's desire that Petitioner not testify. Moreover, Respondent maintains that Petitioner has failed to show that "any objective factor external to the defense which prevented him from raising the within claim of ineffective assistance of counsel in his prior petition." Respondent's Answer at 20.

This Court agrees that Petitioner has failed to show that any objective factor external to the defense impeded presentation of his claim. Petitioner's ineffec-

tive assistance of counsel claim was available to Petitioner when he filed his first petition.[4] Petitioner knew that he had not testified at his trial. He knew that his attorney had unsuccessfully sought to have evidence of his prior convictions suppressed and consequently advised him not to testify. If Petitioner did not ask his trial attorney for a full explanation of the reasoning behind this advice during the trial, no objective factor external to the defense is responsible. And later, when preparing his first habeas petition, Petitioner could have inquired of his trial counsel as to why he had recommended that Petitioner not testify. The record clearly shows that trial counsel Bennett cooperated with this inquiry after Petitioner's first habeas petition was denied in preparation for Petitioner's subsequent second state appeal and second habeas petition. Because Petitioner cannot show that an objective factor external to the defense prevented him from raising his ineffective assistance of counsel claim in his first habeas petition, Petitioner has failed to demonstrate cause for not raising this claim in his first petition. Accordingly, Petitioner's petition is an abuse of the writ.

Because Petitioner has abused the writ by failing to present his ineffective assistance of counsel claim in his first habeas petition, this Court only may grant Petitioner habeas relief on this claim if failure to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice is an extraordinary situation where a constitutional violation has probably caused or is likely to have caused the conviction of a

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4 "If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might have supported or strengthened the claim." *McCleskey* v. *Zant*, 111 S.Ct. at 1472.

person innocent of the crime charged. *Murray* v. *Carrier*, 477 U.S. at 485; *McCleskey* v. *Zant*, 111 S.Ct. at 1470; *Bagby* v. *Sowders*, 894 F.2d 792, 795 (6th Cir. 1990) (*en banc*).[5]

Here, evidence was presented that immediately before the killings, Petitioner retrieved his guns. A surviving eyewitness to the murders testified that he saw and heard Petitioner shoot him and least one other victim after Petitioner announced the robbery. There is no reason to believe that Petitioner is innocent of the crime of which he was convicted.

Furthermore, there was no constitutional violation at Petitioner's trial. Petitioner's trial counsel followed the reasonable strategy of avoiding Petitioner's impeachment with prior armed robbery convictions in a multiple murder trial arising out [*of*] an armed robbery where an eyewitness identified Petitioner as one of the killers. The strategy did not result in an acquittal, but there was no constitutional violation. Therefore, this Court concludes that the present case is not an instance where "a constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey* v. *Zant*, 111 S.Ct. at 1470.

III.

CONCLUSION

For all of the aforementioned reasons, Petitioner's application for writ of habeas corpus is an abuse of the

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5 Of course, the unconstitutional conviction of a person whom the Court is *certain* is actually innocent of the crime charged is also a fundamental miscarriage of justice. Such examples are even more extraordinary than those where a constitutional error "probably" or "likely" resulted in the conviction of a person innocent of the crime charged. *Olsen* v. *McFaul*, 843 F.2d 918, 932-33 (6th Cir. 1988).

writ. Accordingly, Petitioner's writ of habeas corpus is hereby DISMISSED.

IT IS SO ORDERED.

/s/ LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated _____

Dated at Detroit, Michigan, this 25 day of February, 1993.

JOHN P. MAYER
CLERK OF THE COURT
BY: /s/ Bernadette M. Heodte

APPROVED:
/s/ LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX B

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed June 23, 1993)

(GEORGE NORRIS HALL, Petitioner-Appellant, v. HENRY GRAYSON, Warden, Egeler Correctional Facility, Respondent-Appellee — No. 93-1444)

George Norris Hall moves for a certificate of probable cause on appeal from a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

In 1975, Hall was convicted by a jury of two counts of first degree murder, three counts of felony murder, one count of second degree murder, one count of assault with intent to murder, and one count of assault with intent to rob while armed. In the present petition, Hall raises the sole issue of ineffective assistance of counsel. The district court determined that, because this was Hall's second petition for a writ of habeas corpus and because the issue in the present petition could have been raised in his first petition, Hall's petition should be dismissed as an abuse of the writ. Moreover, the district court determined that no miscarriage of justice would occur by not granting habeas relief.

An individual seeking a certificate of probable cause is required to make a substantial showing of a denial of a federal constitutional right. *See Barefoot* v. *Estelle,* 463 U.S. 880, 893 (1983). The record before this court does not meet this standard. Hall did not sufficiently demonstrate cause and prejudice for his failure to previously assert the issue contained within his present petition,

and no miscarriage of justice would occur by not granting habeas relief.

Accordingly, the application for a certificate of probable cause is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed September 28, 1993)

(GEORGE NORRIS HALL, Petitioner-Appellant, v. HENRY GRAYSON, Warden, Respondent-Appellee — No. 93-1444)

BEFORE: RYAN and KENNEDY, Circuit Judges, and PECK*, Senior Circuit Judge.

George Norris Hall has petitioned the court to rehear en banc its order denying him a certificate of probable cause. The petition has been referred to a panel of three judges on which the original deciding judge does not sit, as well as to all other active judges of the court. No judge having requested a vote on the suggestion for en banc rehearing, the petition was referred to the panel of three judges for determination on the merits of the petition for rehearing.

The panel has further reviewed the petition for rehearing and concludes that the application for certificate of probable cause should be granted. Accordingly, the petition for rehearing is hereby granted, and a certificate of probable cause is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

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* **Hon. John W. Peck concurred in the panel's determination on the petition prior to his untimely death on September 7, 1993.**

APPENDIX D

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed June 14, 1994)

(GEORGE NORRIS HALL, Petitioner-Appellant, v. HENRY GRAYSON, Respondent-Appellee — No. 93-1444; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: JONES, BOGGS, and DAUGHTREY, Circuit Judges.

PER CURIAM.

The appellant in this § 2254 action, George Norris Hall, is a prison inmate in the custody of the defendant, who is warden of the state correctional facility in Jackson, Michigan. Hall is serving multiple life sentences as a result of his 1975 convictions for first-degree premeditated murder and felony murder. The circumstances of his arrest and convictions are recited in *People* v. *Hall*, 83 Mich. App. 632, 269 N.W.2d 476 (1978), in which the Michigan Court of Appeals affirmed the trial court's judgment of guilt but remanded for resentencing. Hall subsequently pursued an unsuccessful post-conviction action in state court and, in December 1982, filed a petition for writ of habeas corpus in federal court. The district court denied relief and dismissed the petition; we subsequently affirmed the district court's action. *See Hall* v. *Grant*, No. 84-1531 (6th Cir. Nov. 20, 1985).

Hall then filed this, his second federal habeas corpus petition, in February 1992, asserting that he had received ineffective assistance of counsel at his 1975 state trial, due to his attorney's conflict of interest. The district court concluded that the current application for relief constituted an abuse of the writ, under *McCleskey* v. *Zant*, 499 U.S. 467 (1991), and dismissed Hall's petition. On appeal from this order, the appellant contends that the district court erred in failing to find just cause for the delay in pursuing this claim. We disagree and affirm.

As noted in the district court's memorandum opinion, the single issue presented by this appeal is whether Hall's "defense at trial was sabotaged by a conflict of interest" on the part of his trial attorney. Hall had been indicted along with a co-defendant, Leo McGill. Each defendant had his own attorney, and both sought a severance in the trial court, claiming inconsistent defenses. (Hall's counsel intended to rely on the alternative defenses of insanity and claim of right; McGill's defense was based on mistaken identity.) The trial court apparently determined that the defenses were not inconsistent, but "merely different," and denied severance.

Hall and McGill were thereafter tried jointly, with mixed results; Hall was convicted of the attempted robbery and murder of various members of a poker-playing group of his acquaintances; McGill was acquitted. The crux of Hall's current complaint concerns his decision not to testify in his own behalf at trial, which decision he now claims was urged on him by his counsel, Eugene Bennett, in order to protect the co-defendant, McGill. As a result, Hall insists, he was prevented from presenting a credible claim-of-right defense and was therefore wrongfully convicted on three counts of felony murder. (Claim of right would not, of course, be a valid defense

to two other counts of premeditated murder, for which Hall was also convicted and sentenced to two terms of "non-parolable" life imprisonment.)

The trial transcript shows, however, that Bennett advised Hall not to testify principally because of his client's prior convictions for armed robbery, which the trial court had ruled admissible for impeachment purposes, and also because, in Bennett's words, Hall "was taking medication and he was a little bit zombie-like" during trial.

Hall claims that it was not until 1988 or 1989 that he came into possession of a letter written to his trial attorney by Charles Palmer, McGill's attorney, in 1979. The letter accompanied a copy of a brief "filed in the Hall-McGill case regarding separate trials," which McGill's attorney thought "m[ight] be helpful to George [Hall] in his appeal." Attorney Palmer continued:

> As far as my recollections of the trial go, I clearly remember asking you on a number of occasions to keep George Hall off the stand. I thought it would be harmful to Leo's case. I talked to Leo about it too, and I believe that he talked to George Hall. Leo and I tried everything we could think of to convince you and George to keep George off the stand. I thought that Leo would surely lose if George testified. If George said it wasn't Leo with him, then Wilson would have asked who it was. Since George wouldn't tell, it would have hurt Leo's case. If George testified that he didn't remember who it was, that would also look like he was protecting Leo. Obviously, if George had testified that Leo was with him, then Leo would have been convicted. In any case, Leo would have lost if George testified. We didn't want that and did everything we could to

keep George from testifying since the trials were together.

Hall claims on appeal that the pronoun "we" in the last sentence quoted above refers to Bennett and Palmer, the two attorneys, and insists that it constitutes proof of a concerted effort by the lawyers to help co-defendant McGill, to Hall's detriment. This argument is patently without merit. The obvious antecedents in the quoted paragraph are the author of the letter (McGill's attorney) and McGill himself. Moreover, there was no testimony at the evidentiary hearing in the district court that would refute this rather obvious interpretation of the 1979 letter to Eugene Bennett. Nor was there any other testimony to support Hall's claim that Bennett was ineffective in representing him in 1975. Hence, we conclude that the appellant has failed to demonstrate prejudice of the kind necessary to justify the filing of a subsequent petition for habeas corpus.

Moreover, Hall has also failed to establish good cause for the delay in bringing his claim of ineffective assistance to the district court's attention. Clearly, the question of trial counsel's effectiveness could have been litigated in the earlier § 2254 action. On this point, the district court filed a thorough and well-reasoned memorandum opinion and order, which is fully supported by the record.

For the reasons given above and on the basis of the district court's opinion, we AFFIRM the judgment below.

APPENDIX E

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed July 27, 1994)

(GEORGE NORRIS HALL, Petitioner-Appellant, v. HENRY GRAYSON, WARDEN, EGELER CORRECTIONAL FACILITY, Respondent-Appellee — No. 93-1444)

BEFORE: JONES, BOGGS, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX F

LETTER FROM CHARLES A. PALMER, ESQ.

CHARLES A. PALMER
ATTORNEY

615 N. CAPITOL
LANSING, MICHIGAN 48933

(517)
371-5689

H. Eugene Bennett
215 N. Walnut
Lansing, Michigan 48933

October 18, 1979

Dear Mr. Bennett:

I am enclosing a brief which I filed in the Hall-McGill case regarding separate trials. It may be helpful to George in his appeal.

As far as my recollections of the trial go, I clearly remember asking you on a number of occasions to keep George Hall off the stand. I thought it would be harmful to Leo's case. I talked to Leo about it too, and I believe that he talked to George Hall. Leo and I tried everything we could think of to convince you and George to keep George off the stand. I thought that Leo would surely lose if George testified. If George said it wasn't Leo with him, then Wilson would have asked who it was. Since George wouldn't tell, it would have hurt Leo's case. If George testified that he didn't remember who it was, that would also look like he was protecting Leo. Obviously, if George had testified that Leo was with him, then Leo would have been convicted. In any case, Leo would have lost if George testified. We didn't want that and did everything we could to keep George from testifying since the trials were together.

I also have some recollection of a part of that trial when we were working against each other. I know that George Hall was mad at me for some questions I asked on

cross-examination. I can't really remember what the questions were right now. You might recall something like that.

If you have any other questions, please give me a call.

Sincerely yours,
/s/ Charles A. Palmer
Attorney at Law

CAP:bs
enc.

APPENDIX G

SUPPLEMENTAL AFFIDAVIT OF LEO D. McGILL

(Dated May 7, 1981)

State of New Mexico
County of Santa Fe — ss.

I, Leo D. McGill, being first duly sworn according to law, do depose and say that I am making this statement as a supplement to more fully explain to the best of my memory and ability my previous affidavit, dated June 27, 1980, concerning the occurrences that transpired on the morning of January 30, 1975:

THAT when George Hall came to my house that morning, I was just backing out from my driveway into the street on my way to work. Not realizing his condition, I yelled at him to follow me and proceeded to drive to work. George followed me in a fairly normal manner, but when I pulled into the parking lot of the cleaners, instead of stopping, his car ran into the rear of mine. Thinking he was drunk, I got angry and jumped out of my stationwagon, but when I got back to his car, George seemed to be passed out across the steering wheel. When I shook George, he seemed to wake up, or at least his eyes opened and he stared at me. When he began to talk, he didn't make much sense. He was rambling on and on about being cheated and hit in the head and he kept repeating Rick Fowler's and Charley Bovinette's names and said over and over: "They took all my money." I finally made out that he wanted me to help him get his money back. I knew that in his condition, George wouldn't be much help, but I agreed because I owed him a favor and I felt he sure needed it that morning.

I went into the cleaners and got a .38 I had stashed there. This was a gun I'd bought from George sometime earlier. When I came back out, I told George to slide over and got behind the wheel of his car. He mumbled a little, but didn't give me much argument. My reason for getting the gun was that I knew that Charley Bovinette always carried a gun or had one near, and I'd heard that on occasion Rick Fowler kept one handy when he had a game going.

I'd intended to drive straight to Rick Fowler's house in East Lansing, which as best as I could figure out from George's ramblings was where the game was, but as soon as George saw my gun, he kept telling me to drive him to his house so he could get his, too. I tried to calm him down, but he was yelling so loud I was afraid he'd wake up the whole neighborhood, so I did as he asked.

When we got near his house, George grabbed my arm and indicated he wanted me to stop. Then he stumbled out of the car and went into the house with the woman as explained in my previous affidavit.

When he came out, he had a pistol in one hand and a handful of shells in the other. He seemed to be getting more incoherent by this time. Nothing he said made much sense. He just kept mumbling over and over that his head hurt and that they took his money.

I got him back into the car and took the gun out of his hand and laid it and the shells on the seat between us next to mine. George seemed to either go to sleep or to pass out about that time.

When we almost had the accident at the corner of Logan and Holmes, George was still out like a light. Hutch and I literally carried him between us when we switched cars. I started to leave him there in his car

and just go with Hutch, but Hutch asked me if I was sure that the game was at Fowler's house and I said I wasn't, so we decided we'd better take George. We figured that if we had to, we could wake him up.

We put George in the front seat of Hutch's car and I drove since I knew the way. Hutch got in back. The car was a '61 or '62 white Cadillac as best as I can remember.

When we got to Rick's house, I parked across the street. Just as we stopped, George seemed to wake up. He was still very foggy, but he seemed to know where he was. He started to get out of the car and Hutch reached up to stop him, but I told Hutch it would be better if George and I went in first, because since they knew us, they wouldn't be so alarmed. I told Hutch that besides that we'd need him for a backup in case there was trouble.

Hutch agreed and George and I got out of the car and walked across the street. When we got to the house, I knocked on the side door and Charley Bovinette opened the door. He acted real nervous and kept glancing at George as he asked me if I wanted some action.

I had both guns in my belt underneath my jacket. I'd loaded George's gun and stuck it there along with mine before we got into Hutch's car.

As we started down the stairs, Bovinette going first, I noticed a bulge in Bovinette's shirt under his belt and I thought it looked like a gun. I turned around and saw that George was right behind me. He had his eyes wide open, but they seemed glassy as if he really wasn't seeing anything. I slipped the guns out of my jacket and handed mine back to George. Right then I was scared. I figured that two of us with guns would be more menacing than just me with two, and I figured that as long

as George had his eyes open, they wouldn't know how messed up he really was.

I gave George my gun because it was a short-barrelled .38 with a very hard trigger pull, and I figured he couldn't accidentally pull the trigger and shoot me. George's gun was a pistol with a clip and it also held more bullets than mine.

This all happened in about thirty seconds. When we got to the bottom of the stairs, George barged in past Bovinette and me. I don't even think he had his finger on the trigger, but he was waving the gun around like he was on a cavalry charge. He kept yelling that he wanted all his fucking money back. Those were his exact words. I think one of the men might have handed him some money, but in all the confusion, I'm not sure.

I pushed Bovinette into the room ahead of me and yelled at everyone to get down on the floor. Just about then Bovinette tried to knock the gun out of my hand. All I could think of was that I thought he had a gun and before I realized what had happened, my gun had gone off twice and there was blood all over him. He staggered and fell down, so I knew he was hit bad.

I spun around and kept yelling for everyone to get down on the floor. Just then Hutch came through the door. Everyone else in the room except George was on the floor by then. Hutch glanced at Bovinette and then moved quickly across the room to where George was standing staring off into space. Hutch took the gun out of George's hand and started shooting at the men who were lying on the floor. At one point Hutch blurted out: "Get the money — all of it."

At the time all this was happening, Curly Gaulden was lying on the floor on his stomach with his head between his arms, facing the floor. No shots were fired

by anyone after Bovinette was shot until Hutch started shooting, and this was after Gaulden was on the floor. I know that George Hall did not fire his gun because it was fully loaded when Hutch grabbed it, and not only was George in no condition to have reloaded it, there simply hadn't been time for him to have done so.

George was in such a daze that I had to help him up the stairs. On the way out of the room, Hutch called me "Larry" for some reason. This must have been why Curly thought my name was Larry at first.

Hutch's voice was low and deep, something like George's, so this might have been why Curly testified at trial that George said the things that Hutch really said.

There was never any intention to rob anyone insofar as I knew. We only went there to get George's money back, but as best I can remember, Hutch kept the money that was gathered rather than giving it back to George.

As we left, I checked Bovinette for the gun I thought he had, but he was clean.

Everything else happened pretty much as I outlined it in my first affidavit. Hutch drove us back to George's car and then followed me while I drove it and George back to his house. Then he drove me to work. Later that morning I was arrested, and I never saw Hutch again.

George did indicate to me after we were locked up that he seemed to remember someone else being there and doing the shooting, but I convinced him he'd imagined it in all the confusion.

Sometime later in about March or April, a man named John Crown whom I'd known previously came on the rock where I was locking [*sic*] at the Ingham County Jail. He told me that he knew Hutch and that Hutch had

come to his house that morning and told him that he'd been there with me and George that morning. I asked Crown not to tell anyone else because I was claiming I wasn't there and I felt my best chance was to leave things as they were. Crown told me that it was no skin off his nose and that he would.

This is as nearly as I can remember, along with the statements in my previous affidavit of June 27, 1980, almost exactly an account of the events that transpired during the early morning hours of January 30, 1975, in which Aubon Hutchens, George Hall, and I were involved.

I declare under penalty of perjury that the foregoing affidavit is true and correct to the best of my knowledge and belief, and that the execution of this affidavit is my voluntary act and deed.

Further affiant sayeth naught.

/s/ Leo D. McGill #25616
PO Box 1059
Santa Fe, New Mexico 87501

Subscribed and sworn to before me
this 7th day of May, 1981
/s/ [*illegible*]
Notary Public

APPENDIX H

AFFIDAVIT OF JOHN CROWN

(State of Michigan — Circuit Court — County of Ingham)

(Dated June 23, 1980)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, vs. GEORGE N. HALL, Defendant-Appellant — L.C. #75-25889-FY)

NOW COMES JOHN CROWN and deposes and says the following, first being duly sworn according to law:

During the early morning hours of January 30, 1975, Aubin Hutchens came to the house in which I was living on Lansing's Northside and proceeded to tell me that he had just been involved in a murder.

Hutch was excited and very nervous. It seems he had been on his way to see me earlier when he was involved in a near accident. Hutch told me that when he got out of his car to check with the other driver, he discovered he knew both occupants of the other car. Leo McGill was driving and the passenger was George Hall. Hutch said Hall seemed to be asleep or unconscious and McGill told him Hall had just been cheated and beaten up in a card game and that they were on their way to try to get Hall's money back.

At that point Hutch said he decided to go along and help because Hall seemed to be in no condition to do anything.

Hutch said McGill parked his car and they got Hall out of it into the back seat of Hutch's car and Hutch drove to a house in East Lansing McGill pointed out.

Hutch told me that when they got there Hall seemed to snap out of it and he and McGill went into the house

while Hutch stood back. Hutch said as soon as Hall and McGill entered the house, he opened the door and walked a few steps down the stairs toward the basement where he could hear voices.

According to Hutch at that point he heard shots and saw a man fall back out into the stairwell at the bottom of the stairs. Hutch said he immediately ran down the stairs where McGill met him at the doorway to the basement. Hall was standing across the room by himself, mumbling, with a gun held loosely in his hand. Hutch said there were three other men lying on the floor. Hutch said he grabbed the gun out of Hall's hand and shot the men lying on the floor because "there wasn't anything else to do."

Hutch said he and McGill then got Hall out of there as fast as they could. Hutch drove them home and came straight to my place. Hutch showed me two guns he said had been used.

When I was arrested and came to the Ingham County Jail in March of 1975, I saw Leo McGill and told him what Hutch had told me. He admitted it was true but asked me please not to tell George Hall because Hall was going the "psych" route and he, McGill, was pleading that he wasn't involved at all. McGill was afraid Hall would put him in the middle if he found out about Hutch. I had problems of my own, so I kept my mouth shut.

When I saw George Hall shortly after he was transferred here to Marquette Branch Prison in March of this year, that was the first time I had told anyone what Hutch had told me since the day five years earlier when I mentioned it to Leo McGill.

I realize the penalty for perjury and am making this statement of my own free will.

/s/ John T. Crown, Affiant

Sworn and subscribed on this
23rd day of June, 1980, before me [*Illegible*], Notary.

Supreme Court, U.S.
FILED
NOV 15 1994
OFFICE OF THE CLERK

(2)

No. 94-715
In the Supreme Court of the United States
October Term, 1994

GEORGE NORRIS HALL,

Petitioner,

v.

HENRY GRAYSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Arthur E. D'Hondt
Assistant Attorney General
Attorneys for Respondent

47P

QUESTION PRESENTED

WHERE PETITIONER FILED AN UNSUCCESSFUL PETITION FOR A WRIT OF HABEAS CORPUS IN 1982 IN WHICH HE COULD HAVE ASSERTED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BUT DID NOT, AND WHERE HE HAS NOT DEMONSTRATED EITHER PREJUDICE OR GOOD CAUSE FOR DELAY, WAS HIS SECOND PETITION FOR WRIT OF HABEAS CORPUS, FILED IN 1992, PROPERLY DISMISSED AS AN ABUSE OF THE WRIT?

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STATEMENT OF THE CASE

Petitioner George Norris Hall (Petitioner), who is serving multiple life sentences in a Michigan prison for his 1975 jury convictions of first degree premeditated murder and felony murder, Mich. Comp. Laws 750.316, assault with intent to commit murder, Mich. Comp. Laws 750.82, and assault with intent to rob while armed, Mich. Comp. Laws 750.89, is seeking a writ of certiorari from the June 14, 1994 decision of the Sixth Circuit Court of Appeals, which affirmed the judgment of the District Court dismissing Petitioner's habeas petition as an abuse of the writ, and held:

> [1] Hall claims on appeal that the pronoun "we" in the last sentence quoted above [letter from Petitioner's co-defendant's Counsel, Mr. Palmer, to Petitioner's trial counsel, Mr. Bennett] refers to Bennett and Palmer, the two attorneys, and

insists that it constitutes proof of a concerted effort by the lawyers to help co-defendant McGill, to Hall's detriment. This argument is patently without merit. The obvious antecedents in the quoted paragraph are the author of the letter (McGill's attorney) and McGill himself. Moreover, there was no testimony at the evidentiary hearing in the district court that would refute this rather obvious interpretation of the 1979 letter to Eugene Bennett. Nor was there any other testimony to support Hall's claim that Bennett was ineffective in representing him in 1975. Hence, we conclude that the appellant has failed to demonstrate prejudice of the kind necessary to justify the filing of a subsequent petition for habeas corpus. App. to Pet. D-4

[2] Moreover, Hall has also failed to establish good cause for the delay in bringing his claim of ineffective assistance to the district court's attention. Clearly, the question of trial counsel's effectiveness could have been litigated in the earlier § 2254 action. On this point, the district court filed a thorough and well-reasoned memorandum opinion and order, which is fully supported by the record. App. to Pet. D-4

STATEMENT OF FACTS

As the Sixth Circuit Court of Appeals stated, the facts concerning Petitioner's convictions are set forth in People v. Hall, 83 Mich. App. 632, 635-636; 239 N.W.2d 476 (1978), lv. den., 405 Mich. 826 (1979):

> Little dispute exists about the events leading up to defendant's conviction. Early in the morning of January 30, 1975, defendant was a participant in a card game at the home of John Fowler in East Lansing, Michigan. At about 3 a.m. defendant and Lawrence Chappell became involved in an altercation. Testimony at trial indicated that defendant produced a knife and threatened Chappell with violence. Eventually the parties returned to their card game and defendant left the building at 5 a.m. At that time only Lawrence Chappell, Charles Bovinette, N. A. Gaulden and John Fowler remained at Fowler's residence. Half an hour later, defendant went to the home of Karen Lawson and demanded the return of firearms he had left with her.
>
> Testimony regarding the actual murders was produced by N. A.

Gaulden, the lone survivor of the incident. At about 6 a.m., defendant and another man identified as Leo McGill returned to the home where the card game was being played. Defendant was refused his request to rejoin the game because he had no money. Defendant responded, "Never mind, it doesn't matter. We are taking all the money anyhow." At this point, defendant and codefendant McGill drew guns and ordered everybody to the floor. Gaulden then heard shots and saw Charles Bovinette fall, although he could not determine who had fired the shots. Next, he saw defendant shoot at Lawrence Chappell.

Defendant then told Gaulden to give him his money. After complying, he was ordered to lie on the floor. He then heard several shots and was struck twice by bullets, once in the side and once in the back. Shortly afterward, Gaulden called the police. On arrival, they found John Fowler and Lawrence Chappell dead. Charles Bovinette died on February 4, 1975.

Petitioner was represented at his trial by H. Eugene Bennett, an attorney for approximately seven years with criminal defense experience, including at

least one prior murder case defense. (January 19, 1990 Evidentiary Hearing Transcript, People v. Hall, Ingham County Circuit Court file number 75-25889-FY [EHT] testimony of H. Eugene Bennett [HEB] pp 23-24) Shortly after becoming Petitioner's trial counsel, Mr. Bennett arranged for Petitioner to be interviewed by a psychologist and a psychiatrist to determine whether Petitioner should raise an insanity and/or diminished capacity defense. (EHT [HEB] pp 9-10) Mr. Bennett also investigated a claim of right defense to the felony murder and robbery counts, based upon Petitioner's attempt to recover money the victims had obtained from him by allegedly cheating at cards. (EHT [HEB] pp 8-9; 19) Mr. Bennett prepared for Petitioner's trial for a num-

ber of months, invested numerous hours and determined that a temporary insanity/diminished capacity defense and a claim of right defense were appropriate and the only available defenses. (EHT [HEB] pp 32-33)

Leo McGill, who was tried with Petitioner on the same charges, was represented by Charles A. Palmer, and relied upon an alibi defense and mistaken identity defense. (EHT [HEB] pp 10, 14; Trial Transcript [TT] People v. Hall, Ingham County Circuit Court file number 75-25889-FY filed in Hall v. Grant, U.S.D.C. E.S. 82-60407, p 2)

A pretrial motion in limine was filed on behalf of Petitioner and McGill to suppress use of certain prior convictions for impeachment purposes in the

event they elected to testify. (EHT [HEB] p 11) The motion was discussed in chambers and the trial court indicated the ruling that would be made. However, the trial court did not rule on the motions on the record prior to jury selection, but took the motions under advisement to allow defense counsel to present additional arguments. Petitioner's trial counsel unequivocally stated that the court's informal ruling would effectively prevent Petitioner from testifying. (TT pp 15-19)

After the jury was sworn and a conference in chambers, but prior to opening statements, the trial court ruled on the motion in limine, and held inter alia, that the prosecutor could question Petitioner in the event he testified,

with respect to his convictions in 1962 for armed robbery, 1966 for attempted breaking and entering, and 1970 for armed robbery to attack his credibility as a witness, but could not refer to a conviction for an offense which did not involve moral turpitude or to two convictions committed while Petitioner was a youth. (TT pp 1336-1337, 1340-1345)

On September 24, 1975, after the prosecutor's opening statement, Petitioner's trial counsel made an opening statement and presented Petitioner's defenses of: 1) diminished capacity due to intoxication, lack of sleep and an injury; 2) intoxication; 3) temporary insanity or irresistible impulse which was stated to be consistent with Petitioner's amnesia concerning the identity

of the person with him and events at the scene of the crime; and, 4) a claim of right to return to recover his money. (TT pp 1354, 1372-1379)

Petitioner's last defense witness in his case in chief was Arnold S. Berkman, a psychologist, who testified that Petitioner was unable to resist the impulse to act as charged because of a mental defect. (TT Arnold S. Berkman pp 3311-3312; 3316) During his cross-examination, the prosecutor requested the psychologist's report. Petitioner's trial counsel opposed the request and suggested that the court review the psychologist's reports and notes in camera and then decide. (TT pp 3321-3326, 3331) The trial court's ruling was not made or disclosed,

directly or indirectly in the psychologist's subsequent cross-examination, on the trial record, and the significance of the ruling to Petitioner, and his decision not to testify was not revealed on the record in the trial court by Petitioner's trial counsel, until the January 19, 1990 evidentiary hearing. Then Petitioner's trial counsel testified: that Petitioner made statements to Dr. Berkman concerning McGill that were in the psychologist's report (EHT [HEB] p 11); that the trial court ruled that the psychologist's report was to be furnished to the prosecutor, and that the prosecutor could cross-examine the psychologist concerning the report, except for Petitioner's statements concerning McGill, unless Petitioner testified (EHT

[HEB] p 13); and, that the trial court also ruled that Petitioner could be cross-examined concerning his statements to Dr. Berkman, including his statements about McGill in the event he testified (EHT [HEB] p 13) Petitioner's trial counsel also testified on January 19, 1990, that the trial court's ruling allowing cross-examination of Petitioner concerning his statements to Dr. Berkman if he testified was not anticipated by Petitioner, Petitioner's trial counsel or anyone else including McGill and his trial counsel (EHT [HEB] p 13); and that he believed that if Petitioner had testified, the trial court's ruli[redacted] allowing cross-examination of Petitioner concerning his statements to Dr. Berkman would have resulted in the conviction of McGill (EHT [HEB] p 18).

After Dr. Berkman was excused and Petitioner rested, the following colloquy occurred between Petitioner's trial counsel, the Court, and Petitioner:

> MR. BENNETT (interposing): Your Honor, Mr. Palmer has generously deferred to me. I don't have a motion as such, but Mr. Hall and I have had a tremendous amount of discussion as to the merits and demerits of his taking the stand. He has indicated to me that he will reluctantly follow my advice in this regard.
>
> Just so the record is clear, I state "reluctantly", because he has feeling that he would still like to take the stand, but candidly he feels, on the other hand, that I, being the person more experienced in these matters, that he should follow my advice.
>
> By the same token, I think it is common knowledge that he has been under various tranquilizers and other drugs and I have advised him that ultimately this is his choice, whether he takes the stand or not.
>
> I feel, as an officer of this court, that at this time, after making these observations, that the

Court, if the Court desires to inquire further of me or Mr. Hall in this regard, that this might be the appropriate time to do it.

THE COURT: You say, Mr. Bennett, that the matter of Mr. Hall's testifying on his own behalf has been discussed between the two of you?

MR. BENNETT: Yes, Your Honor, on several occasions, at length.

THE COURT: And you have arrived at the decision jointly that Mr. Hall should exercise his right not to testify?

MR. BENNETT: Yes.

THE COURT: Is that correct, Mr. Hall?

RESPONDENT HALL: Yes. I will take my attorney's advice; he has advised me that I shouldn't.

THE COURT: Do you feel that Mr. Bennett has fully explored all the pros and cons of this particular incident, or would you prefer to discuss it further with him before irrevocably making that decision?

RESPONDENT HALL: I feel that he knows best.

THE COURT: All right.

Mr. Bennett?

MR. BENNETT: Thank you, Your Honor.

(TT pp 3413-3415)

Petitioner's defenses were submitted to the jury. The submission of Petitioner's diminished capacity defense was reviewed by the Michigan Court of Appeals in Petitioner's appeal of right, People v. Hall, 83 Mich. App. 632, 638, 639, and that Court also noted Petitioner's intoxication and insanity defenses. (EHT [HEB] pp 25, 33) The jury was given the following instruction on Petitioner's claim of right defense:

> The specific felonious intent required to be proved beyond a reasonable doubt has previously been explained to you. The law in this state further provides that if one in good faith believes that money which is demanded by him was his money and that he was entitled to its possession, he could not be guilty of either robbery or felony murder, because there would be no felonious intent.

> Therefore, I charge you, considering all of the evidence in this case, that if you find the accused, George Hall, went to the decedents home with the good faith intent of recouping his own money, and not the money of other persons, then the requisite felonious intent is absent and you must acquit George Hall of the charges of robbery and felony murder.

(TT pp 4011, 4040-4041)

On October 24, 1975, following a six-week jury trial, Petitioner was convicted of two counts of first degree premeditated murder, Mich. Comp. Laws 750.316, three counts of first degree felony murder, Mich. Comp. Laws 750.316, one count of second degree murder, Mich. Comp. Laws 750.317, one count of assault with intent to murder, Mich. Comp. Laws 750.82, and one count of assault with intent to rob while armed, Mich. Comp. Laws 750.89. On December 1, 1975, Peti-

tioner was sentenced to five non-parolable life terms on the two first degree murder convictions, two for the premeditated and three for felony murder. The remaining three convictions resulted in parolable life sentences. People v. Hall, 83 Mich. App. 632, 636, 637.

Petitioner was provided another attorney for his appeal of right, Joseph D. Reed, People v. Hall, 83 Mich. App. 632, 634. (EHT [HEB] p 26) Petitioner's appellate counsel raised a number of issues on appeal, and succeeded in having the life sentences for two felony murder convictions and the second degree murder conviction vacated. However, the conviction and other sentences were affirmed. People v. Hall, 83 Mich. App.

632, 637-638, 641. The Michigan Supreme Court denied Petitioner's application for leave to appeal in early 1979. People v. Hall, 405 Mich. 826 (1979).

Petitioner's trial counsel maintained contact with Petitioner, after the trial, and personally visited him. Petitioner's trial counsel received a letter from Leo McGill's trial counsel enclosing a brief from the trial in October 1979, which either he or Petitioner's appellate counsel furnished to Petitioner. (EHT [HEB] p 26)

In 1980, Petitioner filed, inter alia, a pro se delayed motion for a new trial, based upon new evidence, and a challenge to the trial court's ruling concerning the use of Petitioner's prior armed robbery convictions for impeach-

ment in the event Petitioner testified, which Petitioner claimed prevented him from testifying. The trial court denied Petitioner's amended motion and both the Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner's applications for leave to appeal the trial court's decision. (Answer Exhibit A, pp 3-7)

On December 1, 1982, seven years after he decided not to testify shortly after the trial court's ruling that if he testified he would be subject to cross-examination concerning his statements to Dr. Berkman concerning McGill, and three years after Petitioner's trial attorney received the letter from Leo McGill's trial attorney, Petitioner commenced his first action for habeas

corpus in the United States District Court for the Eastern District of Michigan on December 1, 1982. Hall v. Grant, (E.D. Mich.) Civil Action No. 82-60407. Petitioner argued that the trial court's ruling concerning his prior armed robbery convictions violated state evidentiary law and prevented him from testifying. Both the District Court and the Sixth Circuit Court of Appeals held the trial court's ruling was not a constitutional violation. (Answer Exhibit A Memorandum Opinion, pp 6-7; Answer Exhibit B Slip Opinion 6-7)

On January 19, 1990, the trial court held an evidentiary hearing upon Petitioner's claim of ineffective counsel. Petitioner elected to rely solely upon

the testimony of his trial counsel, Mr. Bennett, and not to testify himself or to subpoena any other witnesses, even after the trial court refused to admit the October 18, 1979, letter from McGill's trial counsel, and informed Petitioner, Mr. Palmer should be called as a witness to testify to his mental impressions. (EHT pp 6; 18; 37-38) Mr. Bennett, who met twice with Petitioner to discuss his testimony at the hearing, (EHT [HEB] p 27) testified that he was sympathetic to Petitioner's cause (EHT [HEB] pp 26-37); that co-defendant McGill's trial counsel urged him not to have Petitioner testify, because he might place McGill at the crime scene, and that was one of a number of factors, including the use of prior armed robbery convictions for impeachment and Peti-

tioner's zombie-like appearance from medication that were the basis for his recommendations that Petitioner not testify; (EHT [HEB] pp 20, 27-28); that he had discussed with Petitioner the advantages and disadvantages of testifying and they concluded that Petitioner would not testify (EHT [HEB] p 30); that he never informed the trial court of the requests of McGill's trial counsel (EHT [HEB] p 29); that Petitioner was competent to stand trial (EHT [HEB] p 28); and, that at the time of trial he was convinced that his advice that Petitioner not testify was appropriate (EHT [HEB] pp 31-32); but that, based on the fact that Petitioner was convicted, he now believed that a different strategy would have been better (EHT [HEB] pp 31-32).

On May 10, 1990, the trial court entered an Opinion and Order denying Petitioner's motion for a new trial, which applied the standard in Strickland v. Washington, 466 U.S. 668 (1984), and provides in pertinent part:

> In the instant case, Defendant's claim rests on the fact that he chose, upon advice of counsel, not to testify. Defendant's decision not to testify preserved his fifth amendment right to refuse to incriminate himself with his own testimony. Further, Defendant's decision not to testify protected him from being impeached by his prior conviction.
>
> Defendant alleges that he was unable to tell his side of the story because he was following counsel's advice not to take the stand. However, the record shows that Defendant was able to place his theory of the case before the jury through expert witnesses and counsel. The decision not to testify was a matter of strategy suggested by defense counsel and employed by Defendant which does not render defense counsel's performance ineffective in this case.
>
> In considering all the circumstances, Counsel did not make errors

> so serious that Counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Had Defendant testified, he would have been subject to impeachment by the Prosecutor. Counsel's strategy to decline to place Defendant on the stand was a sound strategy. Defendant has shown no error by his trial attorney.
>
> Therefore, Defendants (sic) allegation if (sic) ineffective counsel is without any factual merit.

(Answer Exhibit C, Opinion and Order, May 10, 1990, p 2)

On February 21, 1992, Petitioner filed his second federal petition for writ of habeas corpus, based on ineffective assistance of counsel.

On February 23, 1993, the District Court entered a Judgment dismissing Petitioner's District Court action and a Memorandum Opinion and Order, which holds:

This Court agrees that Petitioner has failed to show that any objective factor external to the defense impeded presentation of his claim. Petitioner's ineffective assistance of counsel claim was available to Petitioner when he filed his first petition. Petitioner knew that he had not testified at his trial. He knew that his attorney had unsuccessfully sought to have evidence of his prior convictions suppressed and consequently advised him not to testify. If Petitioner did not ask his trial attorney for a full explanation of the reasoning behind this advice during the trial, no objective factor external to the defense is responsible. And later, when preparing his first habeas petition, Petitioner could have inquired of his trial counsel as to why he had recommended that Petitioner not testify. The record clearly shows that trial counsel Bennett cooperated with this inquiry after Petitioner's first habeas petition was denied in preparation for Petitioner's subsequent second state appeal and second habeas petition. Because Petitioner cannot show that an objective factor external to the defense prevented him from raising his ineffective assistance of counsel claim in his first habeas petition, Petitioner has failed to demonstrate cause for not raising this claim in his first petition. Accordingly, Petitioner's petition is an abuse of the writ.

Because Petitioner has abused the writ by failing to present his ineffective assistance of counsel claim in his first habeas petition, this Court only may grant Petitioner habeas relief on this claim if failure to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice is an extraordinary situation where a constitutional violation has probably caused or is likely to have caused the conviction of a person innocent of the crime charged. Murray v. Carrier, 477 U.S. at 485; McCleskey v. Zant, 111 S. Ct. at 1470; Bagby v. Sowers, 894 F.2d 792, 795 (6th Cir. 1990) (en banc).

Here, evidence was presented that immediately before the killings, Petitioner retrieved his guns. A surviving eyewitness to the murders testified that he saw and heard Petitioner shoot him and least (sic) one other victim after Petitioner announced the robbery. There is no reason to believe that Petitioner is innocent of the crime of which he was convicted.

Furthermore, there was no constitutional violation at Petitioner's trail. Petitioner's trial counsel followed the reasonable strategy of avoiding Petitioner's impeachment with prior armed robbery convictions in a multiple murder trial arising out an (sic) armed robbery where an eyewitness identified Petitioner as one of the

> killers. The strategy did not result in an acquittal, but there was no constitutional violation. Therefore, this Court concludes that the present case is not an instances where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 111 S. Ct. at 1470.

App. to Pet. A-9 to A-11.

The Sixth Circuit Court of Appeals' decision affirming the District Court's dismissal of Petitioner's second habeas petition as an abuse of the writ provides in pertinent part:

> As noted in the district court's memorandum opinion, the single issue presented by this appeal is whether Hall's "defense at trial was sabotaged by a conflict of interest" on the part of his trial attorney. Hall had been indicted along with a co-defendant, Leo McGill. Each defendant had his own attorney, and both sought a severance in the trial court, claiming inconsistent defenses. (Hall's counsel intended to rely on the alternative defenses of insanity and claim of right; McGill's defense was based on mistaken identity.) The trial court

apparently determined that the defenses were not inconsistent, but "merely different," and denied severance.

Hall and McGill were thereafter tried jointly, with mixed results; Hall was convicted of the attempted robbery and murder of various members of a poker playing group of his acquaintances; McGill was acquitted. The crux of Hall's current complaint concerns his decision not to testify in his own behalf at trial, which decision he now claims was urged on him by his counsel, Eugene Bennett, in order to protect the co-defendant, McGill. As a result, Hall insists, he was prevented from presenting a credible claim-of-right defense and was therefore wrongfully convicted on three counts of felony murder. (Claim of right would not, of course, be a valid defense to two other counts of premeditated murder, for which Hall was also convicted and sentenced to two terms of "non-parolable" life imprisonment.)

The trial transcript shows, however, that Bennett advised Hall not to testify principally because of his client's prior convictions for armed robbery, which the trial court had ruled admissible for impeachment purposes, and also because, in Bennett's words, Hall "was taking medication and he was a little bit zombie-like" during trial.

Hall claims that it was not until 1988 or 1989 that he came into possession of a letter written to his trial attorney by Charles Palmer, McGill's attorney, in 1979. The letter accompanied a copy of a brief "filed in the Hall-McGill case regarding separate trials," which McGill's attorney thought "m[ight] be helpful to George [Hall] in his appeal." Attorney Palmer continued:

> As far as my recollections of the trial go, I clearly remember asking you on a number of occasions to keep George Hall off the stand. I thought it would be harmful to Leo's case. I talked to Leo about it too, and I believe that he talked to George Hall. Leo and I tried everything we could think of to convince you and George to keep George off the stand. I thought that Leo would surely lose if George testified. If George said it wasn't Leo with him, then Wilson would have asked who it was. Since George wouldn't tell, it would have hurt Leo's case. If George testified that he didn't remember who it was, that would also look like he was protecting Leo. Obviously, if George had testified that Leo was with him, then Leo would have been convicted. In any case, Leo would have lost if George testified. We didn't want that and did everything we could to keep George from testi-

fying since the trials were together.

Hall claims on appeal that the pronoun "we" in the last sentence quoted above refers to Bennett and Palmer, the two attorneys, and insists that it constitutes proof of a concerted effort by the lawyers to help co-defendant McGill, to Hall's detriment. This argument is patently without merit. The obvious antecedents in the quoted paragraph are the author of the letter (McGill's attorney) and McGill himself. Moreover, there was no testimony at the evidentiary hearing in the District Court that would refute this rather obvious interpretation of the 1979 letter to Eugene Bennett. Nor was there any other testimony to support Hall's claim that Bennett was ineffective in representing him in 1975. Hence, we conclude that the appellant has failed to demonstrate prejudice of the kind necessary to justify the filing of a subsequent petition for habeas corpus.

Moreover, Hall has also failed to establish good cause for the delay in bringing his claim of ineffective assistance to the District Court's attention. Clearly, the question of trial counsel's effectiveness could have been litigated in the earlier § 2254 action. On this point, the District Court filed a thorough and well-reasoned memorandum opinion and order, which is fully supported by the record.

> For the reasons given above and on the basis of the District Court's opinion, we AFFIRM the judgment below.

App. to Pet. D-2 to D-4.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

Petitioner does not and cannot establish that this case involves important unsettled questions of federal law or that the decision below conflicts with decisions of this Court or other United States Courts of Appeals. This case merely involves the application of established law to the facts of record to determine whether Petitioner has demonstrated cause and actual prejudice or

a fundamental miscarriage of justice to allow habeas review of his abusive claim.

THE DISMISSAL OF PETITIONER'S SECOND HABEAS PETITION AS AN ABUSE OF THE WRIT WAS CLEARLY CORRECT, BECAUSE PETITIONER FAILED TO DEMONSTRATE CAUSE AND ACTUAL PREJUDICE OR A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

The District Court correctly rejected Petitioner's unsubstantiated claim that the factual basis for his ineffective assistance of counsel claim was not reasonably available to him at the time of his first petition under the standard in McCleskey v. Zant, 499 U.S. 467, 497-502 (1991).

Petitioner knew he did not testify. Petitioner knew his trial attorney had unsuccessfully moved to suppress use of his prior armed robbery convictions for

impeachment purposes. Petitioner knew his trial attorney recommended that he not testify. Prior to his decision not to testify, Petitioner knew that if he testified, he would be cross-examined concerning McGill's participation in the crime and any prior statements to his psychologist concerning McGill's participation. (EHT, p 13) Petitioner must have known that McGill and McGill's trial counsel would prefer that Petitioner not testify under the circumstances. If Petitioner did not ask his trial counsel for a full explanation of the reasons for the advice not to testify, particularly when the trial court offered Petitioner the opportunity to such an explanation before deciding whether to testify (TT, pp 3414-3415), no objective factor external to the

defense was responsible for Petitioner not discovering during his trial, and prior to deciding not to testify, the factual basis for his ineffective assistance of counsel claim. Petitioner clearly had this knowledge prior to filing his first petition for habeas corpus on December 1, 1982.

There is no factual basis in the record for Petitioner's claim that he did not receive a copy of Palmer's October 18, 1979 letter until 1988 or that his trial counsel, Bennett, did not communicate with him from the time of his conviction to 1987. Petitioner did not testify to those facts. Nor did his trial counsel, the only witness Petitioner presented in support of his claim of ineffective assistance of trial coun-

sel at the January 19, 1990 Evidentiary Hearing. In fact, Petitioner's claim is contrary to the record.

Petitioner's trial counsel maintained contact with Petitioner after the trial and personally visited him (EHT [HEB] p 9). Petitioner's trial counsel also apparently solicited a trial brief and information from McGill's trial counsel for Petitioner, which resulted in the October 1979 letter, prior to Petitioner's first application for a writ of habeas corpus. Either Petitioner's trial counsel or Petitioner's appellate counsel furnished Petitioner the October 1979 letter. (EHT [HEB] p 26) Petitioner's trial counsel cooperated with Petitioner's preparation for the evidentiary hearing upon his second

motion for a new trial in the trial court. (EHT [HEB] p 27) Petitioner could have discussed trial counsel's advice with his trial counsel when preparing his first application. Therefore, the District Court concluded that Petitioner had failed to establish that an objective factor external to the defense prevented him from raising his ineffective assistance of counsel claim in his first petition, and had failed to establish cause for not raising the claim in his first application. The Sixth Circuit Court of Appeals held the District Court's determination that Petitioner had failed to establish cause was fully supported by the record and that Petitioner's ineffective assistance of trial counsel claim could have been litigated in Petitioner's first habeas action.

The District Court concluded that this case did not involve an extraordinary situation where a constitutional violation has probably or is likely to have caused the conviction of a person innocent of the crime charged required for the fundamental miscarriage of justice exceptions, Murray v. Carrier, 477 U.S. 478 (1986); McCleskey v. Zant, 111 S. Ct. at 1470, because:

> Here, evidence was presented that immediately before the killings, Petitioner retrieved his guns. A surviving eyewitness to the murders testified that he saw and heard Petitioner shoot him and (sic) least one other victim after Petitioner announced the robbery. There is no reason to believe that Petitioner is innocent of the crime of which he was convicted.
>
> Furthermore, there was no constitutional violation at Petitioner's trial. Petitioner's trial counsel followed the reasonable strategy of avoiding Petitioner's impeachment with prior armed robbery convictions in a multiple murder trial arising out an (sic) armed

> robbery where an eyewitness identified Petitioner as one of the killers. The strategy did not result in an acquittal, but there was no constitutional violation. Therefore, this Court concludes that the present case is not an instance where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 111 S. Ct. at 1470.

App. to Pet. A-11.

Petitioner refers to various post-conviction affidavits concerning the actions of his co-defendant McGill and another person, Aubin Hutchens, who is now deceased, at the crime scene, which were at issue as alleged newly discovered evidence in Petitioner's first habeas action. The District Court and the Sixth Circuit Court of Appeals in Petitioner's first habeas action held those affidavits were not a basis for habeas relief, and this Court denied

Petitioner's application for writ of certiorari in Hall v. Grant, No. 85-6485. Petitioner's "other guy" affidavits which are, at least, as questionable as the "other guy" affidavits in Herrera v. Collins, 506 U.S. ___; 113 S. Ct. ___; 122 L. Ed. 2d 203 (1993), do not constitute a colorable showing of factual innocence to allow consideration of his otherwise barred abusive claim of ineffective assistance of trial counsel. Nor does Petitioner's abusive alleged ineffective assistance of trial counsel claim constitute a constitutional violation under either the actual prejudice or fundamental miscarriage of justice standards.

The Sixth Circuit Court of Appeals correctly rejected Petitioner's argument

that he demonstrated actual prejudice with his abusive ineffective assistance of counsel claim, because Palmer's October 18, 1979 letter, the basis for Petitioner's alleged conflict of interest claim, does not show Petitioner's trial counsel was representing McGill to the detriment of Petitioner, and neither does Petitioner's trial counsel's testimony, the only other evidence presented by Petitioner to support his claim. The District Court correctly concluded that Petitioner had not demonstrated a constitutional violation under the fundamental miscarriage of justice standard for the same reasons.

Petitioner's trial counsel's advice that Petitioner not testify, after Dr. Berkman's testimony, is strongly pre-

sumed to be an exercise of reasonable professional judgment, was clearly not outside the wide range of professionally competent assistance, and is not subject to second guessing, because of Petitioner's conviction. Strickland v. Washington, 466 U.S. 668, 689, 690 (1983). The mere fact that Petitioner's trial counsel considered the requests or urgings of McGill's trial counsel that Petitioner not testify with all the other known and obvious factors to be considered, does not establish that Petitioner's trial counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected" Petitioner's trial counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980); Strickland v. Washington, supra. Thus,

Petitioner's conflict of interest claim is clearly unfounded and without any factual or legal basis.

The lower courts' conclusions that there was no constitutional violation is clearly correct. When Petitioner made his decision not to testify, Petitioner's diminished capacity, intoxication, temporary insanity and claim of right defenses had been presented through other witnesses; Petitioner was competent, but had a zombie-like appearance from medication (EHT [HEB] pp 27-28); Petitioner knew his prior armed robbery convictions would be used in cross-examination for impeachment purpose; Petitioner knew he would be waiving his right to incriminate himself; and Petitioner knew he would be

subject to cross-examination concerning his statements to his psychologist and psychiatrist, including his statements about McGill, which could possibly damage their credibility and his credibility. Clearly, it was a reasonable trial strategy for Petitioner to avoid the risks of testifying as the District Court ruled.

The dismissal of Petitioner's second application for a writ of habeas corpus as an abuse of the writ was clearly correct, because Petitioner failed to demonstrate cause for not raising his ineffective assistance of counsel claim in his first application, and actual prejudice or a fundamental miscarriage of justice.

CONCLUSION

Wherefore, Respondent urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, MI 48909
(517) 373-1124

Arthur E. D'Hondt
Assistant Attorney General

Attorneys for Respondent

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